Filed 2/24/05 Rawn v. WCAB (City of Fowler) CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JEANNE RAWN , Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD, CITY OF FOWLER et al., Respondents.	F046466 (WCAB No. FRE 171889) **OPINION**

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of review. Dominic E. Marcelli, Administrative Law Judge.

Quinlan, Kershaw & Fanucchi and Edward L. Fanucchi, for Petitioner.

No appearance by Respondent Workers' Compensation Appeals Board.

Law Offices of Jane Woodcock and Jane Woodcock, for Respondent, City of Fowler.

Phillip L. Mach, for Respondent, Zenneth Insurance Company.

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*Before Ardaiz, P.J., Levy, J., and Gomes, J.

Jeanne Rawn petitions for a writ of review (Lab. Code,[1] § 5950) challenging the determination of the Workers' Compensation Appeals Board excluding from the record medical evidence expanding on previously prepared medical reports offered into evidence after the close of discovery. We will deny the petition.

BACKGROUND

In November 1996, Gerald Rawn (Rawn) began working for the City of Fowler (Fowler) in its Finance Department through a temporary agency, Denham Personnel Services (Denham). On January 15, 1997, Fowler directly hired Rawn to serve as its finance director and he continued in that position until suffering a fatal heart attack at his home on Sunday, January 4, 1998.

In March 1998, Rawn's wife Jeanne (Petitioner) filed a workers' compensation claim for death benefits alleging job-related stress between January 4, 1997, and January 4, 1998, caused her husband's heart attack. In June 2000, Petitioner declared she was ready to proceed with a hearing to determine whether the death arose out of and in the course of employment.

At a Mandatory Settlement Conference (MSC) on July 24, 2000, the Workers' Compensation Administrative Law Judge (WCJ) closed discovery and set trial for September 22, 2000. At the trial, however, the WCJ concluded neither party's Qualified Medical Examiner (QME) medical reports constituted substantial evidence to make a determination and reopened discovery. At a November 2000 MSC, the parties advised the WCJ they were unable to agree in selecting an Agreed Medical Examiner (AME) and the WCJ advised the parties he would appoint an Independent Medical Examiner (IME). The following week, the WCJ appointed Robert Blau, M.D., as the IME.

Dr. Blau issued a 32-page IME report on July 9, 2001, and was deposed on April 4, 2002. Dr. Blau reviewed and summarized voluminous documents, including

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[1] Further statutory references are to the Labor Code unless otherwise indicated.

subpoenaed medical and employment records, each party's QME reports, and numerous deposition transcripts. Dr. Blau opined Rawn's employment with Fowler, while substantial, stressful, and requiring a great deal of time and attention, was not a contributing factor to his death given his apparent personality type and medical history of insulin dependent diabetes, coronary disease, and a previous heart attack.

At an August 1, 2002, hearing the WCJ agreed with Petitioner that from the deposition transcript, Dr. Blau apparently could not decipher some of Rawn's medical reports prepared by his family physician, Dr. Howard Lichtenstein, between April 1997 through November 1997. The WCJ therefore ordered the parties to obtain from Dr. Lichtenstein a transcription of his handwritten notes; the WCJ denied, however, Petitioner's request to allow Dr. Lichenstein to provide further explanation or details regarding the entries in his medical records because such statements would constitute inadmissible hearsay.

In an undated letter to the parties received in late August 2002, Dr. Lichtenstein summarized his medical records from six office visits in 1997. The last paragraph of Dr. Lichtenstein's letter provided:

> "In summary during 1997 Mr. Rawn's depression, heartburn, diabetes, and ultimately with his death, his heart disease all worsened due to the stress of his position as City of Fowler Finance Director."

In November 2003, the WCJ forwarded Dr. Lichtenstein's correspondence to Dr. Blau for his review. On November 12, 2003, Dr. Blau issued a supplemental IME report noting his opinion that Rawn's death was not industrially related remained unchanged. Dr. Blau remarked:

> "Clearly, the issue of stress in the workplace was complex. There were a number of considerations involved. I cannot take Dr. Lichtenstein's opinion at face value because it seems to come out of the blue, without written evidence that there was discussion of the issues, none were stated in his office notes. He has laid no foundation for us, has expressed an opinion without backup evidence that this was a considered opinion."

On March 26, 2004, Petitioner's counsel deposed Dr. Lichtenstein, who testified he was treating Rawn for depression and that on more than one occasion Rawn mentioned his position as finance director involved a great deal of responsibility causing him stress and physical ailments. Near the beginning of Dr. Lichtenstein's testimony, attorneys for respondents Fowler and Denham both objected to the deposition because the WCJ had previously closed discovery.

At trial on April 14, 2004, Dr. Lichtenstein's undated letter was received into evidence without objection. However, the WCJ refused to admit a similar letter prepared by Dr. Lichtenstein on July 25, 2002, summarizing Rawn's medical charts and further suggesting Dr. Lichtenstein had been treating Rawn for work-related stress. The WCJ reasoned the July 25, 2002, report was "untrustworthy hearsay prepared by Dr. Lichtenstein five and a half years after the events depicted therein and does not fall under any of the exceptions to the hearsay rule." Moreover, the WCJ reasoned the July 25, 2002, report was obtained "well after discovery closed at the MSC in accordance with the provisions of Labor Code Section 5502(e)(3)" and the Petitioner "has not demonstrated that this report could not have been discovered by the exercise of due diligence prior to the MSC …." The WCJ also excluded Dr. Lichtenstein's March 26, 2004, deposition testimony for the same reasons, again explaining "this deposition took place well after discovery had been closed pursuant to 5502(e)(3) of the Labor Code as well as the fact that this is self-serving hearsay and does not fall within any hearsay exception of the Evidence Code …."

On July 2, 2004, the WCJ adopted the IME's medical opinion and ruled Rawn's death did not arise out of and in the course of his employment with Fowler and Denham. The WCJ also prepared a Report and Recommendation to the WCAB reiterating that Dr. Lichtenstein's opinions as contained in his July 25, 2002, letter and subsequent deposition testimony were inadmissible as offered after the close of discovery. (§ 5502, subd. (e)(3).) The WCJ further reasoned that given the length of time that had passed

since Dr. Lichtenstein prepared the reports and his incentive "to assist the dependants of a long time patient," his statements made in 2002 and 2004 "lacked trustworthiness" and were therefore inadmissible hearsay. (Evid. Code, § 1252.) The WCJ found Dr. Blau's opinion "persuasive, well reasoned and substantial medical evidence to support" the finding Rawn's death was not industrially related. On reconsideration, the WCAB agreed and adopted the WCJ's analysis as its own.

DISCUSSION

In reviewing an order, decision, or award of the WCAB, an appellate court must determine whether, in view of the entire record, substantial evidence supports the WCAB's findings. (§ 5952; *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164.) An appellate court is precluded from substituting its choice of the most convincing evidence for that of the WCAB, and may not reweigh the evidence or decide disputed questions of fact. (*Georgia-Pacific Corp. v. Worker's Comp. Appeals Bd.* (1983) 144 Cal.App.3d 72, 79; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227.) Thus, if the WCAB's findings " ' "are supported by inferences which may fairly be drawn from evidence even though the evidence is susceptible of opposing inferences, the reviewing court will not disturb the award." ' " (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d, 658, 664.)

Petitioner contends the WCAB denied her due process rights by excluding Dr. Lichtenstein's July 25, 2002, letter and March 26, 2004, deposition testimony from Dr. Blau's consideration in preparing the IME report. Petitioner attempts to relitigate the relevancy of Dr. Lichtenstein's opinion and contends that by not permitting Dr. Blau to consider his opinion, the WCAB's decision lacks substantial evidence. Petitioner fails, however, to refute the WCAB's determination the evidence was properly omitted as untimely offered into the record.

Section 5502, subdivision (e)(3)[2] provides:

> "If the claim is not resolved at the mandatory settlement conference, the parties shall file a pretrial conference statement noting the specific issues in dispute, each party's proposed permanent disability rating, and listing the exhibits, and disclosing witnesses. Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference."

The Legislature enacted the early discovery closure procedures in workers' compensation proceedings " 'to minimize delays and efficiently expedite case resolution by making sure parties are prepared for hearing' " and to ensure a productive dialogue in framing the stipulations and issues for hearing. (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 (*Telles Transport*).) In *Telles Transport,* this court highlighted the statutory conflict between closing discovery at the time of the MSC under section 5502 and the WCAB's continuing obligation to fully develop the record under sections 5701 and 5906. (*Telles Transport, supra*, at pp. 1163-1165.) Agreeing with *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 936, we found the specific discovery limitation prevailed over the WCAB's more general duty to develop the record where additional medical evidence was available but not offered into evidence before the close of discovery. (*Telles Transport, supra,* at pp. 1164-1165.)

Pursuant to section 5502, subdivision (e)(3), discovery closed in the present matter on three separate occasions. It first closed at the time of the MSC on July 24, 2000. However, the WCJ reopened discovery on September 22, 2000, after discovering the medical record was insufficient to determine whether Rawn's injury arose out of and in

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[2] Section 5502, subdivision (e)(3) was previously numbered subdivision (d)(3) before January 1, 2003. (See Stats. 2002, ch. 6, § 80; Stats. 2002, ch. § 866 (A.B. 486).)

the course of his employment as Fowler's finance director. With full knowledge that Dr. Lichtenstein had treated Rawn before his death, Petitioner could have sought further medical evidence and deposition testimony from him while discovery had been reopened. After a second MSC, the WCJ appointed Dr. Blau as the IME in November 2001. Again, Petitioner did not seek any supplemental documentation or testimony from Dr. Lichtenstein. On June 5, 2002, discovery again closed at the third MSC. At trial on August 1, 2002, the WCJ ordered the parties to obtain Dr. Lichtenstein's transcribed chart notes, specifically prohibiting him from providing any explanation beyond that contained in his medical records. The WCJ permitted Dr. Lichtenstein's response into evidence, and Dr. Blau commented in his November 12, 2003, supplemental report that he reviewed Dr. Lichtenstein's transcribed chart notes and they did not change his medical opinion.

Under the specific terms of section 5502, subdivision (e)(3), evidence is admissible after the close of discovery only upon a showing it was unavailable or undiscoverable with the exercise of due diligence prior to the MSC. Petitioner failed to make such a showing, offering no convincing explanation as to why Dr. Lichtenstein's supplemental reporting and deposition testimony was not obtained during the numerous discovery periods.

Even if Dr. Lichtenstein's July 25, 2002, letter and March 26, 2004, deposition should have been admitted into the record, Petitioner was not prejudiced because it is apparent admitting the evidence would not have changed the outcome of the WCAB's determination. In Dr. Blau's supplemental report prepared after reviewing Dr. Lichtenstein's undated letter transcribing his chart notes, Dr. Blau did not credit any weight to Dr. Lichtenstein's final opinion that Rawn's physical problems were caused by work-related stress. Dr. Blau found Dr. Lichtenstein's opinion came "out of the blue, without written evidence" as an opinion lacking any support in his own medical records. Similarly, the WCJ discredited Dr. Lichtenstein's opinion as untrustworthy because of

the number of years that had passed since conducting the medical examinations and his personal self-interest in aiding the wife of a longtime patient. Given the little weight either Dr. Blau or the WCJ credited Dr. Lichtenstein's opinion, consideration of the omitted evidence would not have changed the WCAB's determination.

DISPOSITION

The Petition for Writ of Review is denied. This opinion is final forthwith as to this court.